Supreme Court, U.S.
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No. 06-528

In The
Supreme Court of the United States

TOM LUNDEEN, *et al.*,

Petitioners,

v.

CANADIAN PACIFIC RAILWAY COMPANY, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Can a federal statute that creates no cause of action for the injured party provide a basis for federal jurisdiction and removal of a state tort claim filed in state court under the doctrine of complete preemption?

2. Does the Federal Railroad Safety Act ("FRSA") authorize complete preemption of state-law tort claims over railroad accidents, thereby conferring jurisdiction on federal courts, where the FRSA contains no private right of action for persons injured by a railroad's acts or omissions?

PARTIES TO THE PROCEEDINGS BELOW

The following individuals were plaintiffs in the district court and appellees in the court of appeals, and are petitioners here: Tom and Nanette Lundeen, individually and as parents of their minor children Molly and Michael Lundeen; Melissa Todd; Irene Clore Korgel; Trent Westmeyer and Randi Lou Westmeyer; Darla M. Just; Mary Beth Gross, individually, and Mary Beth Gross on behalf of, and as parent and natural guardian of Brett Gross; Mark Nesbit and Sandra Nesbit; LeRoy Slorby; Ray Lokoduk; JoAnn Flick; Wilfred Dahly and Geraldine Dahly; Marilyn Carlson; Gerald Wickman; Dion Darveaux, individually, and Brenda Darveaux, individually, and Dion Darveaux and Brenda Darveaux on behalf of, and as parents and natural guardians of Kendall Darveaux, a minor; Shelly Hingst; Bobby Smith and Mary Smith; Richard Muhlbradt; Doug Weltzin; Nathan Freeman, individually and Nichole Freeman, individually, and Nathan Freeman and Nichole Freeman on behalf of, and as parents and natural guardians of Ashlyn Freeman, a minor; Charlotte Goerndt; Leo Gleason; Judy Deutsch, individually, and Judy Deutsch on behalf of, and as parent and natural guardian of Tyrone Deutsch, a minor; Denise Duchsherer, Leo Duchsherer, and Joshua Duchsherer; Larry Crabbe and Carol Crabbe; Rebecca M. Behnkie on behalf of, and as parent and natural guardian of Nathaniel Behnkie, a minor; Charles Swenson and Sandra Swenson; Larry Schafer, individually, and Tami Schafer, individually, and Larry Schafer and Tami Schafer on behalf of, and as parents and natural guardians of Jenna Schafer, a minor; John Salling, individually, and Lorenda Poissant Salling, individually, and Lorenda Poissant Salling on

PARTIES TO THE PROCEEDINGS BELOW – Continued

behalf of, and as parent and natural guardian of Sebastian Poissant, a minor; Rachelle Todosichuk; Lonnie Shigley; and Richard McBride and Linda McBride.

The following entities were defendants in the district court and appellants in the court of appeals, and are respondents here: Canadian Pacific Railway Company; Canadian Pacific Limited; Canadian Pacific Railway Limited; and Soo Line Railroad Company.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit (Pet App. 1a to 29a) is reported at 447 F.3d 606. The opinions of the United States District Court for the District of Minnesota, initially denying the motion to remand (Pet. App. 30a to 42a), and then granting the motion for remand following amendment of the complaint (Pet. App. 43a to 52a), are respectively reported at 342 F. Supp. 2d 826 and 2005 WL 563111.

JURISDICTION

The decision of the United States Court of Appeals was issued on May 16, 2006. Pet. App. 20a. A timely petition for rehearing en banc was denied on July 18, 2006. Pet. App. 53a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant portions of 28 U.S.C. §§ 1331 and 1441 and of the Federal Railroad Safety Act, 49 U.S.C. §§ 20101 *et seq.*, are set forth at Pet. App. 54a to 60a.

STATEMENT

A. Introduction

For more than a century, persons injured by railroads have brought suits in state court under state-law theories of liability. These tort claims went forward based upon

failures to meet standards set under either federal law or state law. In 1970, Congress enacted the Federal Railroad Safety Act ("FRSA") "to promote safety in every area of railroad operations and reduce railroad-related accidents and incidents." 49 U.S.C. § 20101. After that enactment, plaintiffs continued to bring their state tort claims in state court, again either based upon violations of the standards set in federal law, o where federal law does not cover the issue, based upon state-law standards.

In a decision that radically upsets the settled jurisdictional and substantive framework, the court below held that, despite the absence of any cause of action at all under the FRSA, railroad track inspection claims are subject to the complete preemption doctrine and therefore must be removed to federal court. That holding, which conflicts with the decisions of this Court and those of numerous other courts of appeals, means that causes of action that historically have been brought against railroads in state courts may only be brought in federal court. Indeed, in the wake of the decision below, respondent has removed approximately 150 cases from state court to federal court, asserting that all claims against the railroad must be heard in federal court under the complete preemption doctrine. Under the Eighth Circuit's holding, victims of train derailments, like the tragic occurrence here, will be channeled to federal court only to be told that they have no remedy at all. Congress intended no such result when enacting the FRSA. Because the Eighth Circuit's decision deepens and widens the conflict among the circuits on complete preemption and is contrary to this Court's decisions, the petition should be granted and the decision below should be reversed.

B. Background of This Case

In the early morning hours of January 18, 2002, a freight train derailed 31 of its 112 cars on track owned and maintained by respondent Soo Line Railroad Company (also known as Canadian Pacific Railway), about a half mile from the city limits of Minot, North Dakota. Twelve tank cars, containing liquefied anhydrous ammonia, ruptured or were damaged, resulting in the release of 220,000 gallons of anhydrous ammonia into the atmosphere and creating a toxic cloud that blanketed the city of Minot. One resident, John Grabinger, died from exposure to the ammonia; a multitude of others suffered serious, long-term injuries to their lungs, eyes and respiratory systems.

On June 28, 2004, petitioners Tom and Nanette Lundeen, individually and as parents of their minor children Molly and Michael Lundeen, sued respondent Soo Line, which owns, installed, inspected and maintained the track at issue, along with its parent, respondent Canadian Pacific Railway Company, and other subsidiaries, including respondents Canadian Pacific Limited, and Canadian Pacific Railway Limited (collectively, respondents are identified as "CP Rail"). The action was filed in Minnesota state court, the Hennepin County District Court, where Soo Line is incorporated and has its principal place of business.[1] Petitioners sought damages, alleging in several

[1] Similar cases were brought on behalf of 49 other plaintiffs, whose names are set forth above in the Parties to the Proceedings Below. Like the Lundeens' case, each of these cases was removed to federal district court and subsequently remanded to state court; each of the remands was appealed, and rehearing en banc sought after the court of appeals reversed. By consent of both sides, *Lundeen* was treated as the lead case and the outcome of all the other cases was dependent on *Lundeen*.

(Continued on following page)

counts that respondents' flawed maintenance policies were responsible for the accident and hence for petitioners' injuries. The complaint detailed several respects in which respondents' track was defective under well-established standards. It asserted that respondents had deliberately cut back track inspection efforts to save money. It also alleged that these failings, coupled with the excessive speed at which the train was being operated by respondents, were responsible for the accident and for petitioners' injuries.

At the time suit was filed, CP Rail was defending about 35 cases arising out of the Minot derailment in the same state court. Several of those cases had previously been removed to the United States District Court for the District of Minnesota but were remanded to Hennepin County District Court. Numerous other cases stemming from the Minot derailment were subsequently filed in Hennepin County court. The Hennepin County court established a master file as a repository for all filings relating to the derailment cases, and appointed a special master to administer pretrial proceedings.

C. Proceedings in the District Court

On July 15, 2004, respondents removed the Lundeens' action to the District of Minnesota, asserting that the district court had federal question jurisdiction under 28 U.S.C. § 1331. The notice of removal cited references in the complaint to the rules and regulations of the Federal

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See Pet App. 1a-17a, 39a-40a, 50a. Similarly, in this Court, all 53 original plaintiffs join this petition, but petitioners are identified as the Lundeens for brevity's sake.

Railroad Administration, and the Count III claim that respondents had "violated applicable state law . . . as well as United States law," to show that petitioners had brought federal claims in their state court suit. The Lundeens promptly moved to remand to state court, arguing that their references to such legal standards to show duties that had been violated under state tort law did not amount to bringing federal claims under *Merrell-Dow Pharmaceuticals v. Thompson*, 478 U.S. 804 (1986). The Lundeens also pointed to previous decisions of the federal district court, remanding other suits arising from the Minot derailment, because the court had expressly rejected the argument that preemption by the Federal Railroad Safety Act permitted removal. The Lundeens argued that respondents were raising the same, previously rejected argument. In response, respondents argued that the only basis for removal was the mention of federal standards in the state court complaint; respondents expressly disclaimed any reliance on the complete preemption doctrine as a basis for removal or for federal court jurisdiction.

The district court agreed with respondents that the passing reference in Count III of the complaint to "United States law" as having been violated, with the resultant release of ammonia, was properly construed as reflecting reliance on the federal environmental laws, and hence decided that removal was proper because the complaint arose, at least in part, under federal law. Pet. App. 35a-37a. The Lundeens then sought leave to amend their complaint to dismiss Count III and to remand the case because, once amended, the complaint would no longer include any claims arising under federal law. Respondents argued, however, that remand should be denied because, both by suing in Minnesota where respondents were

incorporated and headquartered instead of in North Dakota where the accident had occurred, and by first bringing a claim that invoked "United States law" and then dismissing that claim, petitioners had been engaged in "forum shopping" which, according to respondents, provided an appropriate basis for denial of a discretionary remand under *Carnegie-Mellon University v. Cohill*, 484 U.S. 343 (1988). The district court, however, agreed with the Lundeens that, given the elimination of Count III from the complaint, the pendency in state court of other cases arising from the same derailment, and the potential for conflict between state and federal cases, the case should be remanded. Pet. App. 46a-47a.

D. Proceedings in the Court of Appeals

Respondents appealed to the United States Court of Appeals for the Eighth Circuit, arguing that the district court had abused its discretion in allowing the complaint to be amended, and had further abused its discretion under *Carnegie-Mellon v. Cohill* and 28 U.S.C. § 1367 by remanding to state court. Respondents justified these arguments by raising the same concerns about forum shopping that they had presented to the district court. Respondents also argued that their federal preemption defense would be an important issue in the case, providing an additional reason to retain supplemental jurisdiction under 28 U.S.C. § 1367. Respondents did not contend that the case still arose under federal law following dismissal of Count III. However, following oral argument, the court sua sponte directed the parties to file supplemental briefs addressing, among other things, whether respondents' intended defense of preemption by the FRSA might provide

a basis for federal jurisdiction under a theory of complete preemption.

In their supplemental brief, respondents reversed ground. Even though, in the district court, they had expressly disavowed complete preemption as a ground for removal, they now argued that what makes the preemptive force of a statute "complete" for the purpose of removal jurisdiction is how "powerful" the preemption is. Supp. Br. at 2-4. Respondents also argued that the FRSA broadly preempts all of petitioners' claims. *Id.* at 5-7, 14-20. Therefore, respondents contended, the very fact that the FRSA preempts claims was itself sufficient to justify its preemptive force as being not merely defensive but "complete," and thus sufficient to provide federal jurisdiction. According to respondents, state courts tend to have too parochial a focus to be trusted with the application of the FRSA preemption defense. *Id.* at 9-10. Moreover, respondents pointed to the Eighth Circuit's previous decision in *Peters v. Union Pacific RR Co.*, 80 F.3d 257 (8th Cir. 1996), which had held that the FRSA completely preempted a locomotive engineer's state-law conversion action, contesting the railroad's refusal to return his engineer's certification.

The Lundeens argued in their supplemental brief, however, that a hallmark of complete preemption is not the "force" of the preemption, but whether Congress has created a federal cause of action it intended to be exclusive, such that any state-law claim asserted was not merely preempted but necessarily transformed into a federal one. Moreover, if, as under the FRSA, the federal statute creates only a regulatory scheme that is enforced primarily through agency rule-making without the creation of any federal cause of action, let alone an exclusive

one, preemption is necessarily only a federal defense that is to be raised in either state or federal court, depending on where the claim has been brought. That defense does not, however, provide a basis for federal jurisdiction. Because FRSA did not create a federal cause of action, the Lundeens argued, it did not create federal jurisdiction as a matter of "complete" preemption.

The court of appeals reversed. It began by stating that, even though respondents had not raised the issue of complete preemption on appeal, a question of subject matter jurisdiction could be raised at any time, including possible grounds for the presence of subject matter jurisdiction as well as grounds for questioning subject matter jurisdiction. Pet. App. 21a. The court noted that preemption is a question of congressional intent, *id.*, and that Congress' purported intention to ensure national uniformity on issues of railroad safety "evince[s] a total preemptive intent." *Id.* 23a, quoting *Peters*. The panel then reviewed the Eighth Circuit's two previous decisions on the issue of FRSA complete preemption, *Peters*, *supra*, and *Chapman v. Lab One*, 390 F.3d 620 (8th Cir. 2004), the latter of which held that common-law claims arising from deficient drug-testing of employees were not preempted by the FRSA's own drug-testing regulations. In both cases, the court noted, the decisions on whether the FRSA preempted state law, and on whether there was "complete preemption," were treated as being the same determination. Pet. App. 23a-25a. The court acknowledged that the FRSA did not create a private right of action, but found that to be of no moment in the complete preemption analysis. Pet. App. 25a n.4.

The court then turned to respondents' argument that the FRSA's track inspection regulations preempted petitioner's state-law claims based on negligent track inspections. The court reasoned that, because the regulations of the Federal Railroad Administration ("FRA") prescribe track inspection protocols, provide for federal and state inspectors to determine whether railroads have met their inspection obligations, and authorize civil administrative penalties for violations, the FRA regulations are intended to prevent negligent track inspection and leave no room for state-law causes of action. Pet. App. 28a. The panel opinion noted, in closing, that "absent en banc review we are bound by our decision in *Peters* to find complete, jurisdictional preemption." *Id.*

Petitioners sought rehearing *en banc*, arguing that each of this Court's previous complete preemption decisions had involved statutes that provided an exclusive federal cause of action, and citing cases from numerous other circuits holding that the existence of an alternate federal cause of action within the jurisdiction of the federal courts is a necessary precondition for "complete preemption." The Lundeens also noted the disarray into which the panel's opinion had thrown the numerous state court cases arising out of the Minot derailment, some of which had already proceeded to trial following the remand, because respondents had not sought a stay from the court of appeals pending their appeal of the decision to remand. The full court of appeals directed a response to the petition but denied rehearing. The only two active judges on the panel below – Judge Bye, the authoring judge, and Judge Smith – voted to rehear the case *en banc*. Pet. App. 53a.

REASONS FOR GRANTING THE WRIT

The Court Should Grant Review to Resolve Conflicts Among the Circuits and Other Lower Courts About Whether the Existence of a Federal Cause of Action Is a Necessary Condition for Establishing Federal Jurisdiction Based on Complete Preemption.

The decision below sharpens an ongoing conflict among the lower courts about the kinds of federal laws that provide a basis for complete preemption of state-law claims, thereby rendering the state claims removable to federal court. The lower courts are deeply divided on the question whether a claim of federal jurisdiction based on complete preemption can succeed when the federal statute at issue does not itself create a federal cause of action that "supplants" the preempted state court remedy. Moreover, the lower courts are divided specifically about whether the FRSA supports removal of state tort claims based on complete preemption. The Court should grant certiorari to resolve this fundamental dispute over federal destruction of state court jurisdiction.

A. The Decision Below Wrongly Applies the Complete Preemption Doctrine – In Conflict With This Court's Decisions

It is settled law that the affirmative defense of preemption does not confer federal jurisdiction. "The presence or absence of federal-question jurisdiction is governed by the 'well-pleaded complaint rule,' which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint. . . . A defense is not part of a plaintiff's properly pleaded statement of his or her claim." *Rivet v. Regions Bank*, 522 U.S. 470, 475 (1998) (citations omitted).

Indeed, no defense – preemption or otherwise – provides federal question jurisdiction. "[A] case may not be removed to federal court on the basis of a federal defense, including the defense of pre-emption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties concede that the federal defense is the only question truly at issue." *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 393 (1987). *Accord Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 12 (1983). Even the extremely broad preemption of the Employee Retirement Income Security Act ("ERISA") "without more, does not convert a state claim into an action arising under federal law." *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 64 (1987). Accordingly, the normal rule is that a federal-law defense to a state-law claim, including the defense of preemption, must be litigated in state court if the plaintiffs have brought their claims in state court, subject, of course, to review by this Court on certiorari from a final state court decision.

There are "only two circumstances" where a state claim may be removed to federal court: "when Congress expressly so provides, such as in the Price-Anderson Act [authorizing removal of tort claims arising from nuclear accidents], or when a federal statute wholly displaces the state-law cause of action through complete preemption." *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 8 (2003). This Court has identified only three federal statutes that wholly displace state-law claims rather than simply defeating them – section 301 of the Labor Management Relations Act ("LMRA"), *Avco Corp. v. Machinists Lodge 735*, 390 U.S. 557 (1968); the National Bank Act, 12 U.S.C.

§§ 85 and 86, *Beneficial*, *supra*; and section 502 of the ERISA, *Metropolitan Life*, *supra*.[2] The defining characteristics, the Court has made clear, are whether "the federal statutes at issue provided the exclusive cause of action for the claim asserted and also set forth procedures and remedies governing that cause of action." *Beneficial*, 539 U.S. at 8.

Thus, as applied in this Court's decisions, complete preemption is a jurisdictional doctrine. It occurs only where Congress has created an exclusive federal cause of action to enforce rights created by a federal statute. If a plaintiff brings a state-law claim that falls within the scope of the exclusive federal action, a federal court recharacterizes the claim as a federal claim, and federal question jurisdiction attaches. *Beneficial*, 539 U.S. at 9. Thus, a federal cause of action is the first prerequisite to complete preemption, and the second is whether Congress

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[2] In special circumstances not applicable here, a federal court may have federal question jurisdiction over a state-law claim that depends on the construction of a federal statute that does not itself create a cause of action, where a disputed substantial question of federal law is a necessary element and removal will not upset the congressionally approved balance of federal and state judicial responsibilities. *See Grable & Sons Metal Products v. Darue Engineering & Mfg.*, 545 U.S. 308, 125 S.Ct. 2363 (2005) (holding national interest in providing a federal forum for federal tax litigation is sufficiently strong to support the exercise of federal question jurisdiction over state-law claim involving substantial issue of federal title law). Explaining and distinguishing *Merrell Dow Pharmaceuticals v. Thompson*, 478 U.S. 804 (1986), *Grable* observed that state-law tort claims involving violations of federal statutes will not fit this narrow exception. *See id.* at 2370-71. Moreover, in a *Grable*-type case, the federal interest does not displace the state-law claim and warrant a finding of complete preemption. The court of appeals directed the parties to brief the application of *Grable* to this case, but did not address that issue in its decision. Accordingly, this petition does not address it further.

charged the federal courts with exclusive jurisdiction to rule on the claims.

Both of those elements are absent here. Nowhere does the FRSA confer an exclusive federal private right of action for persons injured by railroads. The court below neither cited *Beneficial National Bank* nor identified anywhere in the FRSA where Congress intended to eliminate state-law remedies that have existed for more than a century and to replace those remedies with a federal cause of action. What the Eighth Circuit did below was to treat the affirmative defense of substantive preemption under the FRSA as giving rise to "complete preemption" of the type that confers exclusive federal jurisdiction over claims. Nothing in the FRSA or this Court's decisions countenances that result.

B. The Eighth Circuit's Approach Conflicts With the Decisions of Other Circuits.

In seeking to identify the essential characteristics that confine complete preemption claims to a narrow class of cases, a deep split has developed among the courts of appeals that has now been widened by the Eighth Circuit in this case. A clear majority of circuits has rejected the notion accepted below that a regulatory scheme alone is sufficient for the invocation of the complete preemption doctrine. Those courts have assessed the removal of claims pursuant to preemption defenses under a large variety of federal statutes and held that a federal statute cannot effectuate the "complete preemption" that allows removal of state-law claims if Congress did not create a federal cause of action that substitutes for the state cause of action that the plaintiff would otherwise have. For example, the

Fourth Circuit rejected complete preemption under sections 7 and 8 of the National Labor Relations Act, explaining "the sine qua non of complete preemption is a preexisting *federal* cause of action that can be brought in the district courts." *Lontz v. Tharp*, 413 F.3d 435, 442 (4th Cir. 2005). The Seventh Circuit similarly explained this precondition of a federal cause of action in *Rogers v. Tyson Foods, Inc.*, 308 F.3d 785, 789 (7th Cir. 2002). The court stated, "Logically, complete preemption would not be appropriate if a federal remedy did not exist in the alternative. . . . Preemption is what wipes out state law, but the foundation for removal is the creation of federal law to replace state law." *Id.* at 789 (internal quotes and cites omitted). A distinct majority of circuits agree with the analysis in *Lontz* and *Rogers*.[3] In these cases, unlike the approach taken below, the absence of a federal cause of

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[3] *E.g.*, *Felix v. Lucent Technologies*, 387 F.3d 1146, 1158 (10th Cir. 2004) (ERISA); *Opera Plaza Residential Parcel Homeowners Ass'n v. Hoang*, 376 F.3d 831, 839 (9th Cir. 2004) (Telecommunications Act of 1996); *Briarpatch Ltd. v. Phoenix Pictures*, 373 F.3d 296, 304-305 (2d Cir. 2004) (Copyright Act); *Wayne v. DHL Worldwide Express*, 294 F.3d 1179, 1184 (9th Cir. 2002) (Airline Deregulation Act); *Johnson v. Baylor University*, 214 F.3d 630, 631-634 (5th Cir. 2000) (Pilot Records Sharing Act); *American Policyholders Ins. Co. v. Nyacol Products*, 989 F.2d 1256, 1263 (1st Cir. 1993) (CERCLA); *Railway Labor Execs Ass'n v. Pittburgh & Lake Erie RR Co.*, 858 F.2d 936, 942 (3d Cir. 1988) (Railway Labor Act); *Williams v. Midwest Express Airlines*, 315 F. Supp. 2d 975, 979 (E.D. Wis. 2004) (Airline Deregulation Act); *Burton v. Southwood Door Co.*, 305 F. Supp. 2d 629, 637-638 (S.D. Miss. 2003) (Federal Omnibus Transportation Employee Testing Act). *See also Hudson Ins. Co. v. American Elec. Corp.*, 957 F.2d 826, 830 (11th Cir. 1992) (in federal court action for declaratory judgment that insurance policy did not provide CERCLA coverage, court rejected argument that suit to compel coverage would be completely preempted by CERCLA because CERCLA does not create cause of action for insurance coverage).

action was critical to the court's determination that the complete preemption doctrine did not apply.

The view of the great majority of circuits is exemplified by their cases – and, indeed, decisions from this Court – involving preemption under ERISA. Courts routinely hold that, because "a vital feature for complete preemption is the existence of a federal cause of action that replaces the state cause of action," complete preemption extends only to claims for relief that could have been brought under ERISA section 502, *King v. Marriott Int'l*, 337 F.3d 421, 425 (4th Cir. 2003), and where the state plaintiff would have had standing to file under section 502.[4] However, when ERISA's preemptive force comes only from conflict with ERISA's policies, this Court has long held that there is no replacement of state-law claims by section 502, and that the preemption is only conflict preemption that does not support removal. *Franchise Tax Bd.*, 463 U.S. at 25-27.

As the Ninth and Tenth Circuits have held, the fact that the federal statute may give regulatory authority to a federal agency, which in turn has the authority to institute a civil action in district court, does not mean that complete preemption applies, even if the regulatory scheme is established as the exclusive means of enforcement in the area. *Opera Plaza v. Hoang, supra*, 376 F.3d at 838-839; *Schmeling v. NORDAM*, 97 F.3d 1336, 1342-1344 (10th Cir. 1996). Otherwise, every case of claimed "field preemption" could support removal of the allegedly preempted

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[4] *Pascack Valley Hospital v. Local 464A UFCW Welfare Reimb. Plan*, 388 F.3d 393, 400 (3d Cir. 2004); *Felix v. Lucent Technologies*, 387 F.3d 1146, 1158 (10th Cir. 2004).

state claims to federal court. But complete preemption is not "a crude measure of the breadth of the preemption (in the ordinary sense) of a state law by a federal law, but rather . . . a description of the specific situation in which a federal law not only preempts a state law to some degree but also substitutes a federal cause of action for the state cause of action, thereby manifesting Congress's intent to permit removal." *Schmeling*, 97 F.3d at 1342, *quoted in Lucent Technologies*, *supra*, 387 F.3d at 1156-1157. Such decisions comport with the theoretical basis for the doctrine of complete preemption – that Congress has created a cause of action that actually displaces the state cause of action and "converts" it into a federal cause of action within the district court's original jurisdiction. *Aetna Health v. Davila*, 542 U.S. 200, 209 (2004).

A minority of lower court decisions agrees with the Eighth Circuit that complete preemption may exist even in the absence of a federal cause of action. Those courts **have** found complete preemption by a federal statute that did not create a private right of action over which district courts would have had original jurisdiction. For example, in a different case, the Eighth Circuit held that the Railway Labor Act effectuates complete preemption of some state claims that are arguably based on an interpretation of a collective bargaining agreement ("CBA") in the railway or airline industries, even though the statute does not create a federal cause of action.[5] Many other circuits,

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[5] *Gore v. TWA*, 210 F.3d 944, 949-950 (8th Cir. 2000); *Deford v. Soo Line*, 867 F.2d 1080, 1086 (8th Cir. 1989). *See also, e.g., Anderson v. American Airlines*, 2 F.3d 590, 595 (5th Cir. 1993) (dictum that RLA can effectuate complete preemption, but removal reversed because particular state-law claims at issue did not require interpretation of CBA).

however, hold in conflict with the Eighth Circuit that the RLA does not provide a basis for complete preemption of state-law claims, reasoning that, unlike the LMRA, the RLA does not create a federal cause of action to enforce contracts.[6]

Similarly, the Sixth Circuit has upheld complete preemption in a case presenting claims that a labor union engaged in age discrimination in violation of state law by enforcing a rule that persons over the age of sixty-five could not run for union office, and that union officials defamed the plaintiff official when he tried to run in violation of that union rule. *Davis v. UAW*, 392 F.3d 834, 838-840 (6th Cir. 2004), *cert. pending*, No. 05-107. There, the court held that provisions of the Labor Management Reporting and Disclosure Act giving the Labor Department exclusive jurisdiction over union elections authorized complete preemption.

This disagreement among the lower courts about whether complete preemption can be found when a federal statute does not create a federal cause of action is both steadily growing and firmly entrenched, as shown by the Eighth Circuit's refusal to grant en banc review in the face of a petition that showed how generally isolated its position has become. Because this conflict involves fundamental principles of federal jurisdiction and of the relation between federal and state courts, it warrants prompt resolution by this Court.

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[6] *E.g.*, *Geddes v. American Airlines*, 321 F.3d 1349, 1354-1355 (11th Cir. 2003); *Railway Labor Execs Ass'n v. Pittburgh & Lake Erie RR Co.*, 858 F.2d 936, 942 (3d Cir. 1988); *Price v. PSA*, 829 F.2d 871, 876 (9th Cir. 1987).

C. The Decision Below Also Presents A Square Conflict Over Whether the FRSA Provides for Complete Preemption of State Tort Claims.

This case presents a particularly apt vehicle for resolving the conflict because there is also a split among the lower courts about the specific question whether there is complete preemption under the FRSA when state tort actions are brought over railroad accidents.

1. In most circuits, state court lawsuits presenting tort claims allegedly preempted by the FRSA have been held removable or not based solely on whether there was diversity of citizenship or some other basis for federal subject matter jurisdiction, without any suggestion that the FRSA preemption defense could provide a basis for removal.[7] The *en banc* Fifth Circuit, in the course of reversing a district court's refusal to remand a diversity case based on a ruling of improper joinder, squarely stated, albeit without extended discussion, that FRSA preemption is a federal defense and hence not a basis for removal. *Smallwood v. Illinois Cent. R. Co.*, 385 F.3d 568, 575-576 (5th Cir. 2004) (*en banc*). Several district courts have joined *Smallwood*, expressly rejecting arguments of complete preemption under the FRSA, which would allow

[7] *Strozyk v. Norfolk Southern Corp.*, 358 F.3d 268, 270 (3d Cir. 2004); *Macfarlane v. Canadian Pacific Ry. Co.*, 278 F.3d 54, 56 (2d Cir. 2002); *Rushing v. Kansas City Southern Ry. Co.*, 185 F.3d 496, 502 (5th Cir. 1999); *Ingram v. CSX Transp.*, 146 F.3d 858, 860-863 (11th Cir. 1998). None of these decisions expressly addressed the issue of complete preemption. However, as the court below held, subject matter jurisdiction must be considered sua sponte, and hence any ruling requiring remand for lack of diversity implicitly holds that FRSA preemption is a defense rather than an independent basis for removal.

removal of state tort claims.[8] And the Seventh Circuit, addressing the analogous issue of preemption under the Locomotive Inspection Act ("LIA"), has held that the railroad's claim of complete preemption founders on the fact that nothing in the LIA indicates that Congress intended to create a federal forum for the plaintiff's claims. *Adkins v. Illinois Cent. R. Co.*, 326 F.3d 828, 835 (7th Cir. 2003). In sum, the Eighth Circuit's FRSA holding is in conflict with a growing number of lower courts about whether the FRSA preemption defense provides federal question jurisdiction based on the principle of complete preemption. This case is, therefore, an excellent vehicle for deciding whether the absence of a federal cause of action is fatal to a claim of complete preemption.[9]

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[8] *Sullivan v. BNSF Ry. Co.*, ___ F. Supp. 2d ___, 2006 WL 2390330 (D. Ariz. Aug. 17, 2006); *Kelley v. Norfolk & Southern Ry. Co.*, 80 F. Supp. 2d 587, 590-592 (S.D. W.Va. 1999); *Duncan v. Kansas City Southern R. Co.*, 1998 WL 35069621 (W.D. La. April 7, 1998). *See also Civil City of South Bend, Ind. v. Consolidated Rail Corp.*, 880 F. Supp. 595, 598-599 (N.D. Ind. 1995) (no federal question jurisdiction of city's declaratory judgment action seeking to establish that its ordinances are not preempted by the FRSA).

[9] The one case outside the Eighth Circuit that was cited by the court below in support of its determination of complete preemption was *Rayner v. Smirl*, 873 F.2d 60, 65 (4th Cir. 1989), which held that the FRSA's whistleblower protections caused complete preemption of the state whistleblower claims of a railroad employee. Notably, however, FRSA **does** create a specific federal remedy for individual employees, and the Fourth Circuit specifically relied on that federal remedy in finding complete preemption. *See id.* at 63-67 (examining 45 U.S.C. § 441 and holding Congress intended it to be the exclusive remedy for the plaintiff). The Fourth Circuit's decision in *Lontz v. Tharp*, *supra*, shows that the Fourth Circuit is firmly of the view that the existence of a federal cause of action is one of the preconditions for complete preemption.

2. Even apart from the fact that the FRSA does not provide a federal cause of action that could supplant the state cause of action, there is another reason why FRSA preemption would make a particularly unsuitable candidate for complete preemption – the fine lines and particularized factual determinations that often divide the preempted tort claim from the non-preempted claim. The FRSA is unlike section 301 of the Labor-Management Relations Act or section 502 of ERISA, under which there is complete preemption where a plaintiff with a federal cause of action under those provisions seeks to enforce a collective bargaining agreement or benefit plan. The existence vel non of FRSA substantive preemption may depend on the case-specific factual determination of whether there was an individual hazard that imposed a duty to slow or to stop the train,[10] or whether the problem was that vegetation at a crossing blocked a sign (preempted) or blocked the motorist's view of oncoming trains (not preempted),[11] or whether there is federal funding for a particular crossing, a fact that is not always clear at the outset of a case and may even not be finally determined until trial.[12] Indeed, the facts about whether federal funds

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[10] *CSX Transp. v. Easterwood*, 507 U.S. 658, 674 n.15 (1993); *Alcorn v. Union Pacific RR Co.*, 50 S.W.2d 226, 241-242 (Mo. 2001) (citing illustrative cases).

[11] *Shanklin v. Norfolk Southern Ry. Co.*, 369 F.3d 978, 986-988 (6th Cir. 2004); *Clark v. Illinois Cent. R. Co.*, 794 So.2d 191, 195-196 (Miss. 2001).

[12] *E.g.*, *Anderson v. Wisconsin Cent. Transp. Co.*, 327 F. Supp. 2d 969, 973-974 (E.D. Wis. 2004), *Richardson v. Norfolk Southern Ry. Co.*, 923 So.2d 1002, 1008 (Miss. 2006); *Ball v. Burns & McDonnell*, 883 P.2d 756, 762 (Kan. 1994).

were devoted to the one crossing or device that is at issue in the case is often peculiarly within the knowledge of the railroad, and hence subject to manipulation depending on exactly what claims are made by the plaintiff and which claims prove to be the crucial ones in the litigation. *E.g.*, *Hester v. CSX Transp.*, 61 F.3d 382, 384, 386 (5th Cir. 1995) (railroad took inconsistent positions about whether federal funds were actually used to upgrade the subject crossing). *See also Hart v. Bayer Corp.*, 199 F.3d 239, 244-246 (5th Cir. 2000) (fact that FIFRA contains an anti-preemption provision [as does the FRSA] and that many state claims are not preempted by FIFRA militates against finding complete preemption).

If not only the existence of substantive preemption, but the very forum in which the case is to be litigated, depends on the resolution of such factual questions, a case could be tried in one forum, only to have to be sent to the other forum after the trial or even the appeal resolves one of these factual issues.

Equally dangerous to the orderly resolution of cases through certainty about the proper forum is the fact that, thirteen years after *Easterwood* – the Court's first foray into FRSA preemption – there remain major areas of disagreement among the lower courts about whether particular tort claims are preempted by the FRSA or by its implementing regulations. Lower courts disagree about the application of the term "essentially local safety or security hazard," 49 U.S.C. § 20106(1), such as whether the steepness of a grade or sharpness of a curve,[13] the

[13] *Compare Mononghela Connecting R. Co v. Pennsylvania PUC*, 404 A.2d 1376, 1379 (Pa. 1979) (not preempted) *with Union Pac. R. Co. v. California PUC*, 346 F.3d 851 (9th Cir. 2003) (preempted).

presence of multiple or congested tracks,[14] the urban nature of the tracks or crossing,[15] the malfunctioning of the warning signals,[16] fire danger conditions,[17] or obstructed or poor drainage,[18] render the hazard "essentially local." And yet, according to the Eighth Circuit, the determination of each of these legal questions, at the trial level or on appeal, will determine not only the viability of the claim but also the propriety of the forum.

The Eighth Circuit's "preemption equals jurisdiction" analysis thus creates a practical problem as to the substantive preemption analysis. For example, in the *Lundeen* decision, it resulted in a broad ruling that all track inspections claims are preempted, ignoring the particularized analysis required by this Court in *Easterwood* and the

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[14] *Compare Lavigne v. CSX Tranp.*, 2002 WL 1424808 (Mich. App. 2002), at *10-*12 (not preempted) *with Bakhuyzen v. National Rail Passenger Corp.*, 20 F. Supp. 2d 1113, 1117 (W.D. Mich. 1996) (preempted).

[15] *Compare Stevenson v. Union Pac. R. Co.*, 110 F. Supp. 2d 1086, 1091 (E.D. Ark. 2000), *aff'd in part*, 354 F.3d 739 (8th Cir. 2004) (could avoid preemption if state had regulation on point), and *In re Speed Limit for Union Pac. RR Through City of Shakopee*, 610 N.W.2d 677, 683-684 (Minn. App. 2000) (not preempted) *with Santini v. Conrail*, 505 N.E.2d 832, 835-838 (Ind. App. 1987) (preempted).

[16] *Compare Stone v. CSX Transp.*, 37 F. Supp. 2d 789, 794-797 (S.D. W. Va. 1999) (not preempted) *with Smith v. Norfolk and Western Ry. Co.*, 776 F. Supp. 1335, 1341 (N.D. Ind. 1991).

[17] *Compare State v. Chicago, M. St. P. & P.R. Co.*, 484 P.2d 1146, 1149 (Wash. 1971) (not preempted) *with Conrail v. City of Bayonne*, 724 F. Supp. 320, 330-331 (D.N.J. 1989) (preempted).

[18] *Compare State ex rel. Utilities Com'n v. Seaboard Coast Line R. Co.*, 303 S.E.2d 549, 555 (N.C. 1983) (not preempted) *with Black v. Baltimore and O. R. Co.*, 398 N.E.2d 1361, 1363 (Ind. App. 1980) (preempted).

FRA's decision not to create federal standards as to the inspection of track made of continuous welded rail. *See CSX Transp., Inc. v. Easterwood*, 507 U.S. 658 (1993); 49 C.F.R. § 213.119. Moreover, the analysis assumes that only federal courts are capable of making judgments about whether the FRSA preempts claims. This Court has long held, however, that state courts are fully capable of rendering judgments regarding the substantive preemption of state-law claims. *See, e.g., Kircher v. Putnam Funds Trust*, 126 S.Ct. 2145, 2157 (2006) (noting that state courts are equally competent bodies as federal courts, subject to review by the Supreme Court).

D. There Is Widespread Disarray in the Law of Complete Preemption.

Beyond these more specific problems with the holding below is the general disarray in the law of complete preemption. Commentators have noted the confusing state of the law in this area, *e.g.*, Green, *Complete Preemption – Removing the Mystery from Removal*, 86 Calif. L. Rev. 363, 383 (1998), and a study by the Federal Judicial Code Revision Project of the American Law Institute noted the substantial divisions among the lower federal courts about complete preemption, which have given narrower or broader readings to this Court's opinions in the area:

> The failure of the federal courts to develop a coherent doctrine of removal on grounds of complete preemption threatens basic notions of the limited jurisdiction of the federal courts. While this problem falls short of apocalyptic proportions, it injects an unwholesome degree of unpredictability into the law the district courts must

> apply to determine the removability of pre-empted state law claims.
>
> American Law Institute, *Federal Judicial Code Revision Project: Tentative Draft No. 3* (1999), at 279.

The ALI singled out the Eighth Circuit as being especially profligate in finding complete preemption. *Id.* at 295-298. *See also Jones v. Bankboston, N.A.*, 115 F. Supp. 2d 1350, 1356 (S.D. Ala. 2000) (decrying "the Eighth Circuit's lenient test for complete preemption"). Indeed, in *Husmann v. Trans World Airlines*, 169 F.3d 1151, 1152-1153 (8th Cir. 1999), the Eighth Circuit held that the Warsaw Convention effects complete preemption of state-law personal-injury claims filed over accidents occurring during international travel, citing several decisions from other circuits that merely held that the Convention preempts state tort claims brought in federal court, without any further discussion of the propriety of removal. In effect, with its decisions in *Husmann, Deford v. Soo Line*, 867 F.2d 1080, 1086 (8th Cir. 1989), and the decision below, the Eighth Circuit has abolished the distinction between substantive preemption and complete preemption.

Where complete preemption applies, it has the extraordinary effect of turning a state-law case into a federal lawsuit. Without strict limits on the doctrine, there have been, and will continue to be, an "ever-increasing number of cases and contexts" in which complete preemption is invoked. 14B Wright, Miller & Cooper: *Federal Practice & Procedure* § 3722.1, at 508 (1998). There should be no uncertainty regarding the conditions under which that may properly happen, but the square and ongoing conflict among the lower courts described above shows that there is. This Court should resolve that conflict.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Attorneys for Petitioners

October 16, 2006

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 05-1918

Tom Lundeen, individually; Nanette Lundeen, and as parents and natural guardians of Molly Lundeen, a minor, and Michael Lundeen,

Plaintiffs - Appellees,

v.

Canadian Pacific Railway Company; Canadian Pacific Ltd, Sued as Canadian Pacific Limited; Canadian Pacific Railway Limited; Soo Line Railroad Company,

Defendants - Appellants.

No. 05-1920

Appeals from the United States District Court for the District of Minnesota.

John Salling, individually; Lorenda Poissant Salling, individually, and on behalf of, and as parent and natural guardian of Sebastian Poissant, a minor,

Plaintiffs - Appellees,

v.

Canadian Pacific Railway Company; Canadian Pacific Ltd, Sued as Canadian Pacific Limited; Canadian Pacific Railway Limited; Soo Line Railroad Company,

Defendants - Appellants.

No. 05-1922

Dion Darveaux, individually, on behalf of, and as parent and natural guardian of Kendall Darveaux, a minor; Brenda Darveaux, individually, on behalf of, and as a parent and natural guardian of Kendall Darveaux, a minor,

Plaintiffs - Appellees,

v.

Canadian Pacific Railway Company; Canadian Pacific Ltd, Sued as Canadian Pacific Limited; Canadian Pacific Railway Limited; Soo Line Railroad

Company, *
*
Defendants - Appellants. *

No. 05-1923

Larry Schafer, individually, and on behalf of, and as parent and natural guardian of Jenna Schafer, a minor; Tami Schafer, individually, and on behalf of, and as parent and natural guardian of Jenna Schafer, a minor, *
*
Plaintiff - Appellee, *
*
v. *
*
Canadian Pacific Railway Company; Canadian Pacific Ltd, Sued as Canadian Pacific Limited; Canadian Pacific Railway Limited; Soo Line Railroad Company, *
*
Defendants - Appellants. *

No. 05-1924

Gerald Wickman *
*
Plaintiff - Appellee, *
*
v. *
*
Canadian Pacific Railway Company; *
Canadian Pacific Ltd, Sued as Canadian *
Pacific Limited; Canadian Pacific *
Railway Limited; Soo Line Railroad *
Company, *
*
Defendants - Appellants. *

No. 05-1925

Charles Swenson; Sandra Swenson, *
*
Plaintiffs - Appellees, *
*
v. *
*
Canadian Pacific Railway Company; *
Canadian Pacific Ltd, Sued as Canadian *
Pacific Limited; Canadian Pacific *
Railway Limited; Soo Line Railroad *
Company, *
*
Defendants - Appellants. *

No. 05-1926

Rebecca Behnkie, individually, and on behalf of, and as parent and natural guardian of Nathaniel Behnkie, a minor,

Plaintiff - Appellee,

v.

Canadian Pacific Railway Company; Canadian Pacific Ltd, Sued as Canadian Pacific Limited; Canadian Pacific Railway Limited; Soo Line Railroad Company,

Defendants - Appellants.

No. 05-1927

Marilyn Carlson,

Plaintiff - Appellee,

v.

Canadian Pacific Railway Company; Canadian Pacific Ltd, Sued as Canadian Pacific Limited; Canadian Pacific Railway Limited; Soo Line Railroad Company,

Defendants - Appellants.

No. 05-1928

Larry Crabbe; Carol Crabbe,

Plaintiffs - Appellees,

v.

Canadian Pacific Railway Company; Canadian Pacific Ltd, Sued as Canadian Pacific Limited; Canadian Pacific Railway Limited; Soo Line Railroad Company,

Defendants - Appellants.

No. 05-1929

Wilfred Dahly; Geraldine Dahly, *

*

Plaintiffs - Appellees, *

*

v. *

*

Canadian Pacific Railway Company; *
Canadian Pacific Ltd, Sued as Canadian *
Pacific Limited; Canadian Pacific *
Railway Limited; Soo Line Railroad *
Company, *

*

Defendants - Appellants. *

No. 05-1930

Denise Duchsherer; Leo Duchsherer; *
Joshua Duchsherer, *

*

Plaintiffs - Appellees, *

*

v. *

*

Canadian Pacific Railway Company; *
Canadian Pacific Ltd, Sued as Canadian *
Pacific Limited; Canadian Pacific *
Railway Limited; Soo Line Railroad *
Company, *

*

Defendants - Appellants. *

No. 05-1931

Judy Deutsch, individually, and on behalf of, and as natural guardian of Tyrone Deutsch, a minor,

Plaintiff - Appellee,

v.

Canadian Pacific Railway Company; Canadian Pacific Ltd, Sued as Canadian Pacific Limited; Canadian Pacific Railway Limited; Soo Line Railroad Company,

Defendants - Appellants.

No. 05-1932

Jo Ann Flick,

Plaintiff - Appellee,

v.

Canadian Pacific Railway Company; Canadian Pacific Ltd, Sued as Canadian Pacific Limited; Canadian Pacific Railway Limited; Soo Line Railroad Company,

Defendants - Appellants.

No. 05-1933

Leo Gleason,

Plaintiff - Appellee,

v.

Canadian Pacific Railway Company; Canadian Pacific Ltd, Sued as Canadian Pacific Limited; Canadian Pacific Railway Limited; Soo Line Railroad Company,

Defendants - Appellants.

No. 05-1934

Charlotte Goerndt,

Plaintiff - Appellee,

v.

Canadian Pacific Railway Company; Canadian Pacific Ltd, Sued as Canadian Pacific Limited; Canadian Pacific Railway Limited; Soo Line Railroad Company,

Defendants - Appellants.

No. 05-1935

Mary Beth Gross, individually, and on behalf of, and as parent and natural guardian of Brett Gross, a minor,

Plaintiff - Appellee,

v.

Canadian Pacific Railway Company; Canadian Pacific Ltd, Sued as Canadian Pacific Limited; Canadian Pacific Railway Limited; Soo Line Railroad Company,

Defendants - Appellants.

No. 05-1936

Darla M. Just,

Plaintiff - Appellee,

v.

Canadian Pacific Railway Company; Canadian Pacific Ltd, Sued as Canadian Pacific Limited; Canadian Pacific Railway Limited; Soo Line Railroad Company,

Defendants - Appellants.

No. 05-1937

Irene Clore Korgel,

Plaintiff - Appellee,

v.

Canadian Pacific Railway Company; Canadian Pacific Ltd, Sued as Canadian Pacific Limited; Canadian Pacific

Railway Limited; Soo Line Railroad Company,

Defendants - Appellants.

No. 05-1938

Richard McBride; Linda McBride,

Plaintiffs - Appellees,

v.

Canadian Pacific Railway Company; Canadian Pacific Ltd, Sued as Canadian Pacific Limited; Canadian Pacific Railway Limited; Soo Line Railroad Company,

Defendants - Appellants.

No. 05-1939

Richard Muhlbradt,

Plaintiff - Appellee,

v. *
*
Canadian Pacific Railway Company; *
Canadian Pacific Ltd, Sued as Canadian *
Pacific Limited; Canadian Pacific *
Railway Limited; Soo Line Railroad *
Company, *
*
Defendants - Appellants. *

No. 05-1940

Lonnie Shigley, *
*
Plaintiff - Appellee, *
*
v. *
*
Canadian Pacific Railway Company; *
Canadian Pacific Ltd, Sued as Canadian *
Pacific Limited; Canadian Pacific *
Railway Limited; Soo Line Railroad *
Company, *
*
Defendants - Appellants. *

No. 05-1941

Bobby Smith; Mary Smith,

Plaintiffs - Appellees,

v.

Canadian Pacific Railway Company; Canadian Pacific Ltd, Sued as Canadian Pacific Limited; Canadian Pacific Railway Limited; Soo Line Railroad Company,

Defendants - Appellants.

No. 05-1942

Rachelle Todosichuk,

Plaintiff - Appellee,

v.

Canadian Pacific Railway Company; Canadian Pacific Ltd, Sued as Canadian Pacific Limited; Canadian Pacific Railway Limited; Soo Line Railroad Company,

Defendants - Appellants.

No. 05-1943

Shelly Hingst, *

*

Plaintiff - Appellee, *

*

v. *

*

Canadian Pacific Railway Company; *
Canadian Pacific Ltd, Sued as Canadian *
Pacific Limited; Canadian Pacific *
Railway Limited; Soo Line Railroad *
Company, *

*

Defendants - Appellants. *

No. 05-1944

Nathan Freeman, individually, and on *
behalf of, and as parents and natural *
guardians of Ashlyn Freeman, a minor; *
Nicole Freeman, individually, and on *
behalf of, and as parents and natural *
guardians of Ashlyn Freeman, a minor *

*

Plaintiffs - Appellees, *

*

v. *

Canadian Pacific Railway Company; Canadian Pacific Ltd, Sued as Canadian Pacific Limited; Canadian Pacific Railway Limited; Soo Line Railroad Company, *

Defendants - Appellants. *

No. 05-1945

Doug Weltzin, *

Plaintiff - Appellee, *

v. *

Canadian Pacific Railway Company; Canadian Pacific Ltd, Sued as Canadian Pacific Limited; Canadian Pacific Railway Limited; Soo Line Railroad Company, *

Defendants - Appellants. *

No. 05-1946

Melissa Todd, *

*

Plaintiff - Appellee, *

*

v. *

*

Canadian Pacific Railway Company; *
Canadian Pacific Ltd, Sued as Canadian *
Pacific Limited; Canadian Pacific *
Railway Limited; Soo Line Railroad *
Company, *

*

Defendants - Appellants. *

No. 05-1947

Ray Lakoduk, *

*

Plaintiff - Appellee, *

*

v. *

*

Canadian Pacific Railway Company; *
Canadian Pacific Ltd, Sued as Canadian *
Pacific Limited; Canadian Pacific *
Railway Limited; Soo Line Railroad *
Company, *

*

Defendants - Appellants. *

No. 05-1948

Trent Westmeyer; Randi Lou Westmeyer,

Plaintiffs - Appellees,

v.

Canadian Pacific Railway Company; Canadian Pacific Ltd, Sued as Canadian Pacific Limited; Canadian Pacific Railway Limited; Soo Line Railroad Company,

Defendants - Appellants.

No. 05-1949

Leroy Slorby,

Plaintiff - Appellee,

v.

Canadian Pacific Railway Company;

Canadian Pacific Ltd, Sued as Canadian Pacific Limited; Canadian Pacific Railway Limited; Soo Line Railroad Company,

Defendants - Appellants.

No. 05-1950

Mark Nisbet; Sandra Nisbet,

Plaintiffs - Appellees,

v.

Canadian Pacific Railway Company; Canadian Pacific Ltd, Sued as Canadian Pacific Limited; Canadian Pacific Railway Limited; Soo Line Railroad Company,

Defendants - Appellants.

Submitted: October 14, 2005
Filed: May 16, 2006

Before BYE, BEAM, and SMITH, Circuit Judges.

BYE, Circuit Judge.

Canadian Pacific Railway Company (CP Rail) appeals the district court's orders allowing the Lundeens to amend their complaint and remanding the case to state court. We reverse and remand.

I

This action was originally filed by the Lundeens against CP Rail in Minnesota state court. They sued for personal injuries and property damages suffered as a result of a CP Rail freight train derailment in North Dakota. CP Rail removed to the United States District Court for the District of Minnesota based on federal question jurisdiction. The Lundeens amended their complaint in an attempt to remove the federal question. The district court declined to exercise its discretionary jurisdiction over what it construed to be remaining state law claims and remanded to state court. CP Rail appealed, challenging the order allowing the Lundeens to amend their complaint and the remand as improper forum shopping. Regardless of the merits of the forum-shopping argument, we note the amended complaint continues to claim, among other things, CP Rail negligently inspected their tracks as shown by failing to comply with the rules and regulations of the Federal Railroad Administration (FRA), and we thus hold the district

court continues to have jurisdiction through complete preemption of the state law claim of negligent inspection.

II

A question of subject-matter jurisdiction may be raised sua sponte at any time. Long v. Area Manager, Bureau of Reclamation, 236 F.3d 910, 916 (8th Cir. 2001) (citation omitted). Generally, a plaintiff can avoid removal to federal court by alleging only state law claims. Gaming Corp. of Am. v. Dorsey & Whitney, 88 F.3d 536, 542 (8th Cir. 1996) (citing Caterpillar Inc. v. Williams, 482 U.S. 386, 392 (1987)). However, there are exceptions to this general rule. One basis for removal is federal question jurisdiction. See 28 U.S.C. § 1441. A federal question is raised in "those cases in which a well-pleaded complaint establishes either that federal law creates the cause of action *or* that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law." Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 27-28 (1983) (emphasis added). Additionally "complete" preemption is an exception to the well-pleaded complaint rule and, unlike preemption as a defense, is a basis for federal jurisdiction. Gaming Corp., 88 F.3d at 543.

Congressional intent is the "ultimate touchstone" guiding preemption analysis. Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 45 (1987) (citations omitted). "If the statute contains an express preemption clause, then the statutory construction should center on its plain meaning as the best evidence of Congress's preemptive intent." Peters v. Union Pac. R.R., 80 F.3d 257, 261 (8th Cir. 1996). Here, the Lundeens assert in part CP Rail negligently inspected railroad tracks, so we look to the Federal Railroad Safety Act (FRSA), 49 U.S.C.

§ 20101 et. seq., and the extent to which relevant regulations adopted pursuant to it address negligent track inspection.

The preemptive effect of the FRSA is specified in 49 U.S.C. § 20106[1]:

> Laws, regulations, and orders related to railroad safety and laws, regulations, and orders related to railroad security shall be nationally uniform to the extent practicable. A State may adopt or continue in force a law, regulation, or order related to railroad safety or security until the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety or security when the law, regulation, or order—
> (1) is necessary to eliminate or reduce an essentially local safety or security hazard;
> (2) is not incompatible with a law, regulation, or order of the United States Government; and
> (3) does not unreasonably burden interstate commerce.

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[1] Although the current version of the FRSA's preemption clause is worded slightly differently from the original version, we have noted the two versions are "identical in substance." Cearley v. Gen. Am. Transp. Corp., 186 F.3d 887, 890 n.5 (8th Cir. 1999).

On the one hand, Congress created the FRSA to ensure railroad safety would be "nationally uniform to the extent practicable" and "'[t]hese statutory provisions evince . . . a 'total preemptive intent.'" Peters, 80 F.3d at 262 (quoting Nat'l Ass'n of Regulatory Util. Comm'rs v. Coleman, 542 F.2d 11, 13 (3d Cir. 1976)). On the other hand, the preemption provision is "'employed within a provision that displays considerable solicitude for state law in that its express pre-emption clause is both prefaced and succeeded by express savings clauses.'" Chapman v. LabOne, 390 F.3d 620, 626-27 (8th Cir. 2004) (quoting CSX Transp. v. Easterwood, 507 U.S. 658, 665 (1993)).

This circuit has addressed complete preemption in the context of the FRSA on two occasions: Chapman and Peters. In Peters we found complete preemption: "Congress has expressly preempted state laws affecting railroad safety where the Secretary of Transportation has promulgated regulations," as confirmed by "[t]he FRSA regulations explicitly set[ting] out a comprehensive administrative adjudication system for handling certification disputes," which "directly apply to Peters' [state law] conversion claim."[2] 390 F.3d at 262. Thus, we held,

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[2] The administrative adjudication is described as:

> Pursuant to § 434, the Secretary of Transportation issued preemptive regulations concerning engineer certification. Included in these regulations is a specific, detailed scheme setting out dispute resolution procedures. The regulations establish a review board to consider petitions challenging a railroad's denial of certification or recertification, or revocation of

"[a]ny issue raised in this area is a federal issue justifying removal." Id. In Chapman, however, we found no preemption as to common-law claims arising from alleged deficient performance in the drug testing process because "the applicable statute and regulations concerning drug testing do not establish an intent to preempt the substantive common law at issue," where the FRA's drug testing regulations included an anti-waiver provision.[3]

> certification. Any person denied certification can petition the Locomotive Engineer Review Board (Board) to determine whether the denial was improper. Any party adversely affected by the Board's decision has a right of appeal. This "comprehensive remedial scheme . . . serves to confirm [the FRSA's] preemptive scope."

Peters, 80 F.3d at 261 (quoting Rayner v. Smirl, 873 F.2d 60, 65 (4th Cir. 1989)) (citations omitted).

[3] The anti-waiver provision reads:

> An employee required to participate in body fluid testing . . . shall . . . evidence consent to taking of samples . . . . The employee is not required to execute any document or clause waiving rights that the employee would otherwise have against the employer, and any such waiver is void. The employee may not be required to waive liability with respect to negligence on the part of any person participating in the collection, handling, or analysis of the specimen or to indemnify any person for the negligence of others.

Department of Transportation Alcohol/Drug Regulations, 54 Fed. Reg. 53,261 (Dec. 27, 1989); see also 49 C.F.R. 219.11(d)

390 F.3d at 628-29. Because we found no preemption, we reasoned there was thus no complete preemption. Id. at 629.[4] We distinguished Peters by noting: "[u]nlike the drug testing regulations, the rules at issue in Peters did not contain a provision that could be construed as a savings clause through which the Secretary preserved state common-law claims," and in Peters "the comprehensive administrative adjudication

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(1989).

[4] We also noted the FRSA does not "provide[] a private right of action for a person aggrieved by negligence in the analysis of a drug test, and the absence of an alternative cause of action militates against a finding of complete preemption." 390 F.3d at 629. However, our statement was dicta in light of our holding earlier in the opinion there was no complete preemption because not even regular preemption lay. Id. at 629. Compare Gaming Corp., 88 F.3d at 547, which stated:

> The issue of whether complete preemption exists is separate from the issue of whether a private remedy is created under a federal statute. Caterpillar Inc. v. Williams, 482 U.S. 386, 391 n.4, 96 L. Ed. 2d 318, 107 S. Ct. 2425 (1987). Complete preemption can sometimes lead to dismissal of all claims in a case. Although courts may be reluctant to conclude that Congress intended plaintiffs to be left without recourse, see M. Nahas & Co., Inc. v. First National Bank of Hot Springs, 930 F.2d 608, 612 (8th Cir. 1991), the intent of Congress is what controls. Pilot Life Insurance Co. v. Dedeaux, 481 U.S. 41, 45, 95 L. Ed. 2d 39, 107 S. Ct. 1549 (1987) (citations omitted).

system for handling certification disputes . . . influenced our court's complete preemption analysis." Id. at 628, 630.

Given that the FRSA preemption clauses are substantively identical in Peters and Chapman, and our finding complete preemption in the former but not the latter by distinguishing the regulations at issue in the cases, complete preemption turns first on the Secretary of Transportation's regulations "covering the subject matter of the State Requirement" and then any given regulation's solicitude for state law. See 49 U.S.C. § 20106. Again, for example, the drug-testing regulations at issue in Chapman contained an anti-waiver provision which displayed a "solicitude for state common law distinguish[ing it] . . . from the [regulations establishing a] comprehensive administrative adjudication system for handling certification disputes that influenced our court's complete preemption analysis in Peters." 390 F.3d at 630.

In this case, the Lundeens bring claims based in part on negligent inspection of railroad track. FRSA track inspection regulations lack the solicitude for state law demonstrated by the anti-waiver clause in Chapman. This situation is more akin to our discussion in In re Derailment Cases, 416 F.3d 787 (8th Cir. 2005), involving inspection of railroad freight cars. We found preemption where:

> The FRA has adopted regulations that require inspections of freight cars at each location where they are placed in a train. Railroads must designate inspectors who "have demonstrated to the railroad a knowledge and ability to inspect railroad freight cars for compliance with the

[FRA regulations]." The FRA's regulations specify that a railroad may not place or continue in service a car that, inter alia, has a defective coupler or a defective draft key retainer assembly.

The regulations also establish a "national railroad safety program" intended "to promote safety in all areas of railroad operations in order to reduce deaths, injuries and damage to property resulting from railroad accidents." Federal and state inspectors "determine the extent to which the railroads, shippers, and manufacturers have fulfilled their obligations with respect to inspection, maintenance, training, and supervision." Inspectors visit rail yards to ensure compliance with the regulations and railroads face civil penalties for violations.

. . .

. . . It is clear that the FRA's regulations are intended to prevent negligent inspection by setting forth minimum qualifications for inspectors, specifying certain aspects of freight cars that must be inspected, providing agency monitoring of the inspectors, and establishing a civil enforcement regime. These intentions are buttressed by the FRA's inspection manual for federal and state inspectors. Further, there is no indication that the FRA meant to leave open a state tort cause of action to deter negligent inspection. . . . Accordingly, we conclude that Plaintiffs' negligent inspection claims are

preempted by the FRA's regulations.

In re Derailment Cases, 416 F.3d at 793-794 (citations and footnotes omitted). We distinguished Chapman by noting the regulations there "specifically contemplate[d] the existence of a common-law cause of action for negligence." Id. at 794.

Similarly, federal regulations establish a specific inspection protocol including how, 49 C.F.R. § 213.233(b), when, §§ 213.233(c) & .237(a)-(c), and by whom, §§ 212.203, 213.7 & .233(a), track inspections must be conducted; the regulations establish a national railroad safety program intended to promote safety in all areas of railroad operations, § 212.101(a); federal and state inspectors determine the extent to which the railroads, shippers, and manufacturers have fulfilled their obligations with respect to, among other things, inspection, § 212.101(b)(1); and railroads face civil penalties for violations, § 213 App. B. It is clear the FRA regulations are intended to prevent negligent track inspection and there is no indication the FRA meant to leave open a state law cause of action.

We note the FRSA's preemption clause is employed within a provision that displays considerable solicitude for state law in that its express preemption clause is both prefaced and succeeded by express savings clauses, and we also note In re Derailment was a conflict rather than complete preemption case. Nonetheless, where we find the Lundeens' negligent inspection claims preempted following the logic in In Re Derailment and where it is both clear the regulations at issue are intended to prevent negligent track inspection nationally and contain no savings clause (so there is thus no indication the FRA meant to leave open a state law cause of action), absent en

banc review we are bound by our decision in Peters to find complete, jurisdictional, preemption. The district court therefore has subject-matter jurisdiction in the instant case and improperly remanded the case to state court.

III

Based on the foregoing, this case is reversed and remanded for proceedings consistent with this opinion.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Tom Lundeen, individually, and
Nanette Lundeen, individually, and
Tom Lundeen and Nanette Lundeen
of, and as parents and natural guardians
of Molly Lundeen, a minor, and
Michael Lundeen,

Plaintiffs,

Civ. No. 04-3220 (RHK/AJB)
MEMORANDUM OPINION
AND ORDER

v.

Canadian Pacific Railway Company,
Canadian Pacific Limited,
Canadian Pacific Railway Limited, and
Soo Line Railroad Company,

Defendants.

Collin P. Dobrovolny and Bryan L. Van Grinsven, McGee, Hankla, Backes & Dobrovolny, PC, Minot, North Dakota, for Plaintiffs.

Timothy R. Thornton, Scott G. Knudson, and Kevin M. Decker, Briggs and Morgan, Minneapolis, Minnesota, for Defendants.

Introduction

This case (and thirty other "related" cases[1]) arises out of injuries sustained by the release of liquified anhydrous ammonia after a train derailment in North Dakota. Before the Court is plaintiffs' Motion for Remand and For Costs and Attorney's Fees. For the reasons stated below, the Court will deny the Motion.

Background

Plaintiffs in this case are Tom and Nanette Lundeen, both individually and on behalf of Molly and Michael Lundeen (collectively, the "Lundeens"). Defendants are Canadian Pacific Railway Company, Canadian Pacific Limited, Canadian Pacific Railway Limited and Soo Line Railroad Company (collectively "CPR").

On January 18, 2002, a CPR freight train derailed just west of Minot, North Dakota. (Compl.¶ VIII.) Several tank cars containing liquified anhydrous ammonia ruptured and released their contents into the surrounding environment. (Id.)

In June 2004, the Lundeens sued CPR in Minnesota state court alleging injuries and various claims for relief. Among their claims is the following:

COUNT THREE

V.

The Defendant CPR violated applicable state law, both North Dakota and Minnesota, as well as United States law,

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[1] See Exhibit A (attached).

resulting in the release of hazardous substances and which amount to contamination, pollution, unauthorized release of hazardous material and other violations of applicable "environmental laws" and for which Defendant CPR is strictly liable for damages occasioned thereby, including, but not limited to, personal injury, property damage, statutory penalties, actual attorney's fees, and other damages as specified in applicable environmental laws. (Id. Count Three, ¶ V.)

In July 2004, CPR removed the case to this Court based upon federal question jurisdiction pursuant to 28 U.S.C. § 1441(a) and (b). In August 2004, the Lundeens moved to remand the case to state court on the ground that no federal question jurisdiction exists. (Pls.' Reply Mem. in Supp. of Mot. to Remand at 2.)[2]

Standard of Review

A defendant may remove a matter from state court if that matter could have originally been brought in federal court, 28 U.S.C. § 1441(a), or if the federal court has original jurisdiction founded on a claim or right arising under the

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[2] This is not the first time that issues dealing with this train derailment have been before a judge in this District. Judge Montgomery remanded several derailment cases to state court on the ground that the state claims alleged therein were not completely preempted by federal law. See Allende v. Soo Line R.R. Co., et al., Civ. No. 03-3093, slip op. at 32-33 (D.Minn. Jan. 29, 2004) (Report and Recommendation). Unlike the previous cases, however, complete preemption is not at issue in this case. And, as noted below, the previous cases do not allege violations of "United States law."

Constitution, treaties or laws of the United States, 28 U.S.C. § 1441(b).[3] The district court must, however, remand the case to state court "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction...." 28 U.S.C. § 1447(c). The party seeking removal and opposing remand has the burden of establishing federal subject matter jurisdiction. In re Bus. Men's Assurance Co., 992 F.2d 181, 183 (8th Cir.1993). When reviewing a motion to remand, a court must resolve all doubts concerning federal jurisdiction in favor of remand. Id. However, "[a] district court has no discretion to remand a claim that states a federal question" and the existence of a federal question is an issue of law. Gaming Corp. of America v. Dorsey & Whitney, 88 F.3d 536, 542 (8th Cir.1996) (citations omitted).

Analysis

The issue presented on the Lundeens' Motion for Remand is whether this Court has federal question jurisdiction

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[3] Section 1441(a) provides, in relevant part:
Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending....
Section 1441(b) provides, in relevant part:
Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties....

based upon their allegations in Count Three, ¶ V. The Lundeens argue that they do not allege a federal question and request a remand to state court. (Pl.'s Reply Mem. in Supp. of Mot. to Remand at 2; Pl.'s Reply to Defs.' Resp. to Mot. to Remand at 2.) Conversely, CPR argues that the Lundeens*829 allege a federal question-specifically, a question of federal environmental law-and oppose remand. (Defs.' Opp'n to Mot. to Remand at 1, 4.) The Lundeens respond that they did not intend to allege a violation of federal environmental law, and, even if they did, no federal environmental law would provide them with the relief they are requesting. (Pl.'s Reply Mem. in Supp. of Mot. to Remand at 3, 3 n. 3 (citing statutes and cases); Pl.'s Reply to Defs.' Resp. to Mot. to Remand at 2.)

"The presence or absence of federal-question jurisdiction is governed by the 'well-pleaded complaint rule,' which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." Caterpillar Inc. v. Williams, 482 U.S. 386, 392, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987) (citation omitted). "When a federal question is present on the face of the complaint, the district court has original jurisdiction and the action may be removed to federal court." Williams v. Ragnone, 147 F.3d 700, 702 (8th Cir.1998) (citing Caterpillar, 482 U.S. at 392-93, 107 S.Ct. 2425). "[T]he presence of even one federal claim gives the defendant the right to remove the entire case to federal court." Gaming Corp., 88 F.3d at 543 (citing 28 U.S.C. § 1441); see Country Club Estates, L.L.C. v. Town of Loma Linda, 213 F.3d 1001, 1003 (8th Cir.2000) ("A complaint that pleads violations of both state and federal law is within the original jurisdiction of a federal district court." (citations omitted)). But the plaintiff is "the master of the claim," Caterpillar, 482 U.S. at 392, 107 S.Ct. 2425, and "can

avoid removal to federal court by alleging only state law claims," Gaming Corp., 88 F.3d at 542 (citation omitted). As such, "[j]urisdiction may not be sustained on a theory that the plaintiff has not advanced." Merrell Dow Pharm. Inc. v. Thompson, 478 U.S. 804, 809 n. 6, 106 S.Ct. 3229, 92 L.Ed.2d 650 (1986).

The Court finds that the face of the Lundeens' Complaint states a federal question. The Complaint alleges that *"CPR violated applicable state law ... as well as United States law,* resulting in the release of hazardous substances and which amount to contamination, pollution, unauthorized release of hazardous material and other violations of applicable 'environmental laws'...." (Compl. Count Three, ¶ V (emphasis added).) Country Club Estates is instructive. In that case, the Eighth Circuit found that the following allegation invoked federal jurisdiction:

The Court order [referring to an order of the County Commission of Newton County, Missouri, purporting to establish the Town of Loma Linda] is further invalid because Relators were not given proper notice of the hearing as required by the Statutes and Constitution of Missouri *and the Constitution of the United States of America,* including those provisions which prohibit the taking of property without due process of law, which process requires proper notice.

Country Club Estates, 213 F.3d at 1003 (alteration in original) (emphasis added). In finding federal question jurisdiction, the court observed that "[t]he reference to the Constitution of the United States is unequivocal." Id. It concluded that "here, the federal question arises not by way of defense, but on the face of the complaint. It is part of the plaintiffs' cause of action, as demonstrated by the words they

themselves selected." Id. at 1004. Much like the allegation examined in Country Club Estates, the Lundeens' reference to "United States law" in Count Three, ¶ V is unequivocal. It is part of their cause of action as demonstrated by the words they themselves selected.

The Lundeens could have omitted the reference to "United States law" and alleged only state law claims-this would have prevented removal to this Court. See Gaming Corp., 88 F.3d at 542. As the Supreme Court has observed, "the plaintiff is the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law." Caterpillar, 482 U.S. at 392, 107 S.Ct. 2425 (footnote omitted). While "[j]urisdiction may not be sustained on a theory that the plaintiff has not advanced," Merrell Dow, 478 U.S. at 809 n. 6, 106 S.Ct. 3229 (citations omitted), the Court cannot say that the Lundeens have not advanced a theory of liability under federal environmental law. Accordingly, this Court "has no discretion to remand a claim that states a federal question." Gaming Corp., 88 F.3d at 542 (citations omitted).

The Lundeens argue that their reference to "United States law" pertains to federal maintenance and repair regulations that CPR violated, causing the train to derail and spill ammonia in violation of state environmental laws. (Pls.' Reply Mem. in Supp. at 4-5.) The Court is not persuaded. It is not that this argument is beyond belief, but it does nothing to alter the Court's obligation to look to the face of the Complaint and determine whether a federal question is presented. See Caterpillar, 482 U.S. at 392, 107 S.Ct. 2425; Williams, 147 F.3d at 702. Setting the Lundeens' argument to one side, a federal question appears *on the face* of Count Three, ¶ V. Plaintiffs' counsel cannot argue away the words written in the

Complaint. Although the Lundeens contend that their Complaint is identical to those in the derailment cases previously remanded, so far as this Court can tell, none of those cases alleged a violation of "United States law." In sum, a reasonable reading of Count Three, ¶ V reveals that it asserts a federal question.

The Lundeens also argue that even if they alleged a violation of federal environmental laws, such laws generally do not provide a private right of action or allow recovery of personal injuries. (Pls.' Reply Mem. in Supp. at 3 n. 3; Pls.' Reply to Defs.' Resp. at 2-4.) Even if this argument is correct,[4] it is unavailing because it fails to recognize the distinction between the existence of a valid claim upon which the Lundeens could recover and the existence of subject matter jurisdiction. As the Supreme Court has explained:

> It is firmly established in our cases that the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, i.e., the courts' statutory or constitutional *power* to adjudicate the case.... As we stated in Bell v. Hood, 327 U.S 678, 682, 66 S.Ct. 773, 776, 90 L.Ed. 939 (1946), "[j]urisdiction ... is not defeated ... by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover." Rather, the district court has jurisdiction if "the right of the petitioners to recover under their complaint will be sustained

[4] The Court expresses no opinion on the merits of this argument.

> if the Constitution and laws of the United States are given one construction and will be defeated if they are given another," ... unless the claim "clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous...." Dismissal for lack of subject-matter jurisdiction because of the inadequacy of the federal claim is proper only when the claim is "so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy...."

Steel Co. v. Citizens For A Better Environment, 523 U.S. 83, 89, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998) (citations omitted) (emphasis in original); see Caterpillar, 482 U.S. at 391 n. 4, 107 S.Ct. 2425 (" 'The nature of the relief available after jurisdiction attaches is, of course, different from the question whether there is jurisdiction to adjudicate the controversy ....' " (citation omitted)); United States ex rel. Foulds v. Texas Tech Univ., 171 F.3d 279, 288 (5th Cir.1999) ("A determination that the relevant statute creates no cause of action under which the plaintiff may proceed says nothing about a court's subject-matter jurisdiction over the suit." (citation omitted)). In this case, jurisdiction is not defeated by the possibility that the averments to "United States law" might fail to state a cause of action. See Steel Co., 523 U.S. at 89, 118 S.Ct. 1003. Indeed, the absence of a valid cause of action "does not implicate subject-matter jurisdiction." Id. Thus, whether the Lundeens could actually recover under federal

environmental law does not impact the question of jurisdiction.[5] Whether the federal environmental claims would be dismissed for failure to state a claim, and if they were dismissed, whether this Court would exercise its supplemental jurisdiction over the remaining state law claims, are questions for another day.[6]

Conclusion

Based on the foregoing, and all of the files, records, and proceedings herein, **IT IS ORDERED** that the Lundeens' Motion for Remand and For Costs and Attorney's Fees (Doc. No. 6) is **DENIED**.[7]

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[5] It is noteworthy that when it found federal question jurisdiction in Country Club Estates, the Eighth Circuit did not examine whether plaintiffs' constitutional claims would ultimately succeed or provide them with the relief they requested.

[6] Citing Merrell Dow, the Lundeens argue that "a complaint that alleges a violation of a federal statute as an element of a state cause of action, when there is no private, federal cause of action for the violation, does not state a claim 'arising under the Constitution, laws, or treaties of the United States.'" (Pls.' Reply Mem. in Supp. of Mot. to Remand at 3 n. 3.) Unlike the plaintiffs in Merrell Dow, who alleged that a violation of federal law created a rebuttable presumption of negligence, 478 U.S. at 806, 106 S.Ct. 3229, however, the Lundeens do not allege a violation of federal environmental law as an element of a state cause of action. Rather, on the face of their Complaint, they allege a violation of federal environmental law as a cause of action in its own right.

[7] Counsel have agreed that this Memorandum Opinion and Order will apply to each of the "related" cases identified in

Dated: October 26, 2004

s/Richard H. Kyle
RICHARD H. KYLE
United States District Judge

Exhibit A

The "related" cases are:

Salling, et al. v. Canadian Pacific Railway Co., et al., Civ. No. 04-3221;
Darveaux, et al. v. Canadian Pacific Railway Co., et al., Civ. No. 04-3222;
Schafer, et al. v. Canadian Pacific Railway Co., et al., Civ. No. 04-3223;
Wickman v. Canadian Pacific Railway Co., et al., Civ. No. 04-3224;
Swenson, et al. v. Canadian Pacific Railway Co., et al., Civ. No. 04-3225;
Behnkie, et al. v. Canadian Pacific Railway Co., et al., Civ. No. 04-3282;
Carlson v. Canadian Pacific Railway Co., et al., Civ. No. 04-3283;
Crabbe, et al. v. Canadian Pacific Railway Co., et al., Civ. No. 04-3284;
Dahly, et al. v. Canadian Pacific Railway Co., et al., Civ. No. 04-3286;
Duchsherer, et al. v. Canadian Pacific Railway Co., et al., Civ. No. 04-3287;
Deutsch, et al. v. Canadian Pacific Railway Co., et al., Civ. No. 04-3288;

Exhibit A (attached). (See Pls.' Reply Mem. in Supp. of Mot. to Remand at 2 n. 2; Defs.' Opp'n to Mot. to Remand at 1 n. 1.)

Flick v. Canadian Pacific Railway Co., et al., Civ. No. 04-3290;
Gleason v. Canadian Pacific Railway Co., et al., Civ. No. 04-3291;
Goerndt v. Canadian Pacific Railway Co., et al., Civ. No. 04-3292;
Gross, et al. v. Canadian Pacific Railway Co., et al., Civ. No. 04-3293;
Just v. Canadian Pacific Railway Co., et al., Civ. No. 04-3294;
Korgel v. Canadian Pacific Railway Co., et al., Civ. No. 04-3295;
McBride, et al. v. Canadian Pacific Railway Co., et al., Civ. No. 04-3296;
Muhlbradt v. Canadian Pacific Railway Co., et al., Civ. No. 04-3297;
Shigley v. Canadian Pacific Railway Co., et al., Civ. No. 04-3298;
Smith, et al. v. Canadian Pacific Railway Co., et al., Civ. No. 04-3299;
Todosichuk v. Canadian Pacific Railway Co., et al., Civ. No. 04-3300;
Hingst v. Canadian Pacific Railway Co., et al., Civ. No. 04-3301;
Freeman, et al. v. Canadian Pacific Railway Co., et al., Civ. No. 04-3303;
Weltzin v. Canadian Pacific Railway Co., et al., Civ. No. 04-3304;
Todd v. Canadian Pacific Railway Co., et al., Civ. No. 04-3305;
Lakoduk v. Canadian Pacific Railway Co., et al., Civ. No. 04-3306;
Westmeyer, et al. v. Canadian Pacific Railway Co., et al., Civ. No. 04-3307;

Slorby v. Canadian Pacific Railway Co., et al., Civ. No. 04-3309; and
Nisbet, et al. v. Canadian Pacific Railway Co., et al., Civ. No. 04-3311.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Tom Lundeen, individually, and
Nanette Lundeen, individually, and
Tom Lundeen and Nanette Lundeen on
Behalf of, and as parents and natural
Guardians of Molly Lundeen, a minor,
and Michael Lundeen,

Plaintiffs,

Civ. No. 04-3220 (RHK/AJB)
MEMORANDUM OPINION
AND ORDER

v.

Canadian Pacific Railway Company,
Canadian Pacific Limited,
Canadian Pacific Railway Limited, and
Soo Line Railroad Company,

Defendants.

Collin P. Dobrovolny and Bryan L. Van Grinsven, McGee, Hankla, Backes & Dobrovolny, PC, Minot, North Dakota, for Plaintiffs.

Timothy R. Thornton, Scott G. Knudson, and Kevin M. Decker, Briggs and Morgan, Minneapolis, Minnesota, for Defendants.

Introduction

This case (and thirty other "related" cases[1]) arises out of injuries sustained by the release of liquefied anhydrous ammonia after a train derailment in North Dakota. Before the Court is plaintiffs' second remand motion. For the reasons set forth below, the Court will grant the motion.

Background

Plaintiffs in this case are Tom and Nanette Lundeen, both individually and on behalf of Molly and Michael Lundeen (collectively, the "Lundeens"). Defendants are Canadian Pacific Railway Company, Canadian Pacific Limited, Canadian Pacific Railway Limited, and Soo Line Railroad Company (collectively, "CPR").

In June 2004, the Lundeens sued CPR in Minnesota state court. Among their original claims, they alleged that "CPR violated applicable state law ... *as well as United States law*, resulting in the release of hazardous substances and which amount to contamination, pollution, unauthorized release of hazardous material and other violations of applicable 'environmental laws'...." (Compl. Count Three ¶ V (emphasis added).)

In July 2004, CPR removed the case to this Court based upon federal question jurisdiction pursuant to 28 U.S.C. §

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[1] See Exhibit A (attached).

1441(a) and (b).[2] In August 2004, the Lundeens filed their first remand motion on the ground that no federal question jurisdiction existed. This Court denied that motion, finding that the face of the complaint-specifically, the reference to "United States law"-stated a federal question. Lundeen v. Canadian Pacific Ry. Co., 342 F.Supp.2d 826, 829 (D.Minn.2004).[3]

In November 2004, the Lundeens moved to amend their complaint to delete the federal claim and, in the alternative, to voluntarily dismiss that claim. (See Doc. Nos. 26, 29.) At the same time, they filed a motion, conditioned upon amendment of the complaint or voluntary dismissal of the federal claim, to remand to state court. (See Doc. No. 33.)

In January 2005, Magistrate Judge Boylan granted the

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[2] Section 1441(a) provides, in relevant part:
Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending....
Section 1441(b) provides, in relevant part:
Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties....

[3] The Lundeens declined to amend their Complaint at that time-even though the Court's inquiry of counsel should have made it abundantly clear that a request would have been granted.

Lundeens' motion to amend and determined that the motion to dismiss was moot. (Doc. No. 54.) CPR sought reimbursement for expenses incurred in opposing the Lundeens' motions, which it estimated at $5,000. (Id.) Considering that only the motions to amend and dismiss were pending before him, while the second remand motion was before the undersigned, Magistrate Judge Boylan ordered the Lundeens (and another moving party) to pay CPR a total of $2,000. (Id.)

In February 2005, the Lundeens filed an Amended Complaint. (Doc. No. 55.) The reference to "United States law," which had formed the basis for federal question jurisdiction, was deleted. The Court now considers the Lundeens' second remand motion.

Analysis

The Lundeens argue that this case should be remanded to state court because the federal claim has been deleted and only state-law claims remain. In Carnegie-Mellon University v. Cohill, 484 U.S. 343, 348 (1988), the Supreme Court considered whether a district court has discretion to remand a removed case to state court "when all federal-law claims have dropped out of the action and only pendant state-law claims remain." The plaintiffs in Cohill filed suit in state court alleging violations of state and federal age-discrimination laws, as well as state common-law claims. Id. at 345. Defendants removed on the basis of federal question jurisdiction. Id. Six months later, the plaintiffs moved to amend their complaint to delete the federal claim and moved to remand. Id. at 346. After granting the motion to amend, the district court remanded the action to state court. Id. The Supreme Court held that "a district court has discretion to remand to state court a removed case involving

pendant claims upon a proper determination that retaining jurisdiction over the case would be inappropriate." Id. at 357. In exercising discretion to remand, district courts are to consider "the principles of economy, convenience, fairness, and comity." Id.

Under these principles, the Court finds that retaining jurisdiction over this case would be inappropriate. First, this case is in its initial stages and a remand would waste little judicial resources: no scheduling orders have been issued, no discovery has been conducted, and no trial date has been set. Second, it is not inconvenient or unfair for CPR to litigate this matter in state court. Presently, CPR is defending cases in state court that arise out of the same train derailment. See *e.g.*, Allende v. Soo Line R.R. Co., et al., Civ. No. 03-3093 (D.Minn. Jan. 29, 2004) (Report and Recommendation recommending case be remanded to state court). Finally, remand will avoid a determination of state-law claims by this Court that could conflict with state court decisions in the other derailment cases. See Cohill, 484 U.S. at 350-51. As noted in Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966), upon which the Cohill court relied, "[n]eedless decisions of state law [by federal courts] should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law."

CPR argues that the remand motion should be denied because the Lundeens have engaged in forum shopping. While the Cohill court recognized that "forum manipulation" is a factor to be considered when determining whether to remand a case, there is no "categorical prohibition" on remanding cases where the plaintiff has attempted to manipulate the forum. Cohill, 484 U.S. at 357. Here, the Court finds no forum manipulation has

occurred that would prohibit remand. The Lundeens have explained that they had no desire to allege or pursue federal claims. Once this Court determined that they had alleged a federal claim, which was only a small portion of the original Complaint, they promptly moved to amend and remand. Moreover, to the extent that forum manipulation may have occurred, remand is still warranted given the weight of the factors pointing in favor of sending the case back to state court.

As the Supreme Court has recognized, "in the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered under the pendant jurisdiction doctrine-judicial economy, convenience, fairness, and comity-will point toward declining to exercise jurisdiction over the remaining state-law claims." Id. at 350 n. 7. Here, as in Cohill, the balance of factors points toward declining to exercise jurisdiction over the Lundeens' remaining state-law claims. Accordingly, the Court will grant the Lundeens' Motion to Remand Action.[4]

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[4] Although the Lundeens primarily rely on Cohill in support of their remand motion, they also cite 28 U.S.C. § 1367(c)(2) and (3) as bases for remand. Section 1367(c)(2) and (3) provide that district courts may decline to exercise supplemental jurisdiction over state-law claims where "the claim substantially predominates over the claim or claims over which the district court has original jurisdiction" or where "the district court has dismissed all claims over which it has original jurisdiction." The Court finds that § 1367(c) provides additional support for remand. See In re Prairie Island Dakota Sioux, 21 F.3d 302, 304 (8th Cir.1994) (affirming remand of removed case under § 1367(c) and Cohill where the plaintiff amended complaint to delete federal-law claims).

As a final matter, CPR seeks reimbursement of its costs and attorneys' fees. They argue that the Lundeens' federal claim, which has now been deleted, caused it "to research, draft, and file Notices of Removal, Notices of Filing of Removal, Opposition to Remand, Response to Motion to Remand, and Opposition to Motions to Amend or Dismiss Complaint and Remand Action." (CPR Supp. Opp'n Mem. at 4.) It fixes its costs at $4,650, which represents a $150 filing fee for each of the thirty-one removed cases. (Decker Aff. ¶ 1.) It fixes its reasonable attorneys' fees for "removing plaintiffs' case to this Court and responding to plaintiffs' two motions for remand" at $7,570. (Id. ¶ 5.) Thus, CPR seeks $12,220 in total reimbursement. The Lundeens have not opposed CPR's request.

Considering the totality of the circumstances, the Court concludes that the Lundeens should reimburse CPR $3,500 for its attorneys' fees. When given the opportunity to eliminate the federal claim during the first remand motion, counsel for the Lundeens declined. His refusal to strike that claim caused CPR to litigate two otherwise unnecessary remand motions. In the Court's view, it is fair and just for the Lundeens to reimburse CPR for part of its attorneys' fees. However, it would not be fair or just to require the Lundeens to reimburse CPR for its thirty-one filing fees or for that portion of its attorneys' fees not associated with the remand motions. First, contrary to CPR's suggestion, the federal court litigation was not all for naught-it resulted in the elimination of a federal claim. Second, as exemplified by Cohill, there is always a risk when removing a case based on federal question jurisdiction that the complaint will be amended and the case remanded. Finally, this amount takes into account Magistrate Judge Boylan's order that the Lundeens (and another moving party) pay CPR $2,000.

Conclusion

Based on the foregoing, and all of the files, records, and proceedings herein, IT IS ORDERED:[5]

1. The Lundeens' Motion to Remand Action (Doc. No. 33) is GRANTED and this matter, and the thirty "related" actions identified in Exhibit A (attached), shall be remanded to Hennepin County District Court; and
2. The Lundeens shall reimburse CPR for reasonable attorneys' fees in the total amount of $3,500 (this is in addition to the $2,000 ordered by Magistrate Judge Boylan).

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: March 9, 2005

s/Richard H. Kyle
RICHARD H. KYLE
United States District Judge

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[5] As with the first remand motion, counsel have agreed that this Memorandum Opinion and Order will apply to each of the "related" cases identified in Exhibit A (attached).

Exhibit A

The "related" cases are:

Salling, et al. v. Canadian Pacific Railway Co., et al., Civ. No. 04-3221;
Darveaux, et al. v. Canadian Pacific Railway Co., et al., Civ. No. 04-3222;
Schafer, et al. v. Canadian Pacific Railway Co., et al., Civ. No. 04-3223;
Wickman v. Canadian Pacific Railway Co., et al., Civ. No. 04-3224;
Swenson, et al. v. Canadian Pacific Railway Co., et al., Civ. No. 04-3225;
Behnkie, et al. v. Canadian Pacific Railway Co., et al., Civ. No. 04-3282;
Carlson v. Canadian Pacific Railway Co., et al., Civ. No. 04-3283;
Crabbe, et al. v. Canadian Pacific Railway Co., et al., Civ. No. 04-3284;
Dahly, et al. v. Canadian Pacific Railway Co., et al., Civ. No. 04-3286;
Duchsherer, et al. v. Canadian Pacific Railway Co., et al., Civ. No. 04-3287;
Deutsch, et al. v. Canadian Pacific Railway Co., et al., Civ. No. 04-3288;
Flick v. Canadian Pacific Railway Co., et al., Civ. No. 04-3290;
Gleason v. Canadian Pacific Railway Co., et al., Civ. No. 04-3291;
Goerndt v. Canadian Pacific Railway Co., et al., Civ. No. 04-3292;

Gross, et al. v. Canadian Pacific Railway Co., et al., Civ. No. 04-3293;
Just v. Canadian Pacific Railway Co., et al., Civ. No. 04-3294;
Korgel v. Canadian Pacific Railway Co., et al., Civ. No. 04-3295;
McBride, et al. v. Canadian Pacific Railway Co., et al., Civ. No. 04-3296;
Muhlbradt v. Canadian Pacific Railway Co., et al., Civ. No. 04-3297;
Shigley v. Canadian Pacific Railway Co., et al., Civ. No. 04-3298;
Smith, et al. v. Canadian Pacific Railway Co., et al., Civ. No. 04-3299;
Todosichuk v. Canadian Pacific Railway Co., et al., Civ. No. 04-3300;
Hingst v. Canadian Pacific Railway Co., et al., Civ. No. 04-3301;
Freeman, et al. v. Canadian Pacific Railway Co., et al., Civ. No. 04-3303;
Weitzin v. Canadian Pacific Railway Co., et al., Civ. No. 04-3304;
Todd v. Canadian Pacific Railway Co., et al., Civ. No. 04-3305;
Lakoduk v. Canadian Pacific Railway Co., et al., Civ. No. 04-3306;
Westmeyer, et al. v. Canadian Pacific Railway Co., et al., Civ. No. 04-3307;
Slorby v. Canadian Pacific Railway Co., et al., Civ. No. 04-3309; and
Nisbet, et al. v. Canadian Pacific Railway Co., et al., Civ. No. 04-3311.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 05-1918

Tom Lundeen, et al.	*	
	*	
Appellees,	*	
	*	Order Denying Petition
v.	*	for Rehearing and for
	*	Rehearing En Banc
Canadian Pacific Railway	*	
Co., etc. et al.,	*	
	*	
Appellants.	*	

The motion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Bye and Judge Smith would grant the petition for rehearing en banc.

(5128-010199)

July 18, 2006

Order Entered at the Direction of the Court.

Clerk, U.S. Court of Appeals, Eighth Circuit

STATUTES INVOLVED

28 U.S.C. § 1331 provides:

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1441 provides, in pertinent part:

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

The Federal Railroad Safety Act, 49 U.S.C. § 20101 *et seq.*, provides as follows in pertinent part:

Section 20101. Purpose

The purpose of this chapter is to promote safety in every area of railroad operations and reduce railroad-related accidents and incidents.

Section 20104. Emergency authority

(c) Civil actions to compel issuance of orders.--An employee of a railroad carrier engaged in interstate or foreign commerce

who may be exposed to imminent physical injury during that employment because of the Secretary's failure, without any reasonable basis, to issue an order under subsection (a) of this section, or the employee's authorized representative, may bring a civil action against the Secretary in a district court of the United States to compel the Secretary to issue an order. The action must be brought in the judicial district in which the emergency situation is alleged to exist, in which that employing carrier has its principal executive office, or for the District of Columbia. The Secretary's failure to issue an order under subsection (a) of this section may be reviewed only under section 706 of title 5.

Section 20106. National uniformity of regulation

Laws, regulations, and orders related to railroad safety and laws, regulations, and orders related to railroad security shall be nationally uniform to the extent practicable. A State may adopt or continue in force a law, regulation, or order related to railroad safety or security until the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety or security when the law, regulation, or order--

(1) is necessary to eliminate or reduce an essentially local safety or security hazard;
(2) is not incompatible with a law, regulation, or order of the United States Government; and

(3) does not unreasonably burden interstate commerce.

Section 20109. Employee protections

(a) Filing Complaints and Testifying. - A railroad carrier engaged in interstate or foreign commerce may not discharge or in any way discriminate against an employee because the employee, whether acting for the employee or as a representative, has -

(1) filed a complaint or brought or caused to be brought a proceeding related to the enforcement of this part or, as applicable to railroad safety, chapter 51 or 57 of this title; or

(2) testified or will testify in that proceeding.

(b) Refusing to work because of hazardous conditions.--(1) A railroad carrier engaged in interstate or foreign commerce may not discharge or in any way discriminate against an employee for refusing to work when confronted by a hazardous condition related to the performance of the employee's duties, if--

(A) the refusal is made in good faith and no reasonable alternative to the refusal is available to the employee;

(B) a reasonable individual in the circumstances then confronting the employee would conclude that--

(i) the hazardous condition presents an imminent danger of death or serious injury; and

(ii) the urgency of the situation does not allow sufficient time to eliminate the danger through regular statutory means; and

(C) the employee, where possible, has notified the carrier of the hazardous condition and the intention not to perform further work unless the condition is corrected immediately.

(2) This subsection does not apply to security personnel employed by a carrier to protect individuals and property transported by railroad.

(c) Dispute resolution.--A dispute, grievance, or claim arising under this section is subject to resolution under section 3 of the Railway Labor Act (45 U.S.C. 153). In a proceeding by the National Railroad Adjustment Board, a division or delegate of the Board, or another board of adjustment established under section 3 to resolve the dispute, grievance, or claim, the proceeding shall be expedited and the dispute, grievance, or claim shall be resolved not later than 180 days after it is filed. If the violation is a form of discrimination that does not involve discharge, suspension, or another action affecting pay, and no other remedy is available under this subsection, the Board, division, delegate, or other board of adjustment may award the employee reasonable damages, including punitive damages, of not more than $20,000.

§ 20111. Enforcement by the Secretary of Transportation

(a) Exclusive authority.--The Secretary of Transportation has exclusive authority--

(1) to impose and compromise a civil penalty for a violation of a railroad safety regulation prescribed or order issued by the Secretary;
(2) except as provided in section 20113 of this title, to request an injunction for a violation of a railroad safety regulation prescribed or order issued by the Secretary; and
(3) to recommend appropriate action be taken under section 20112(a) of this title.

(b) Compliance orders.--The Secretary may issue an order directing compliance with this part or with a railroad safety regulation prescribed or order issued under this part.

(c) Orders prohibiting individuals from performing safety-sensitive functions.--If an individual's violation of this chapter or any of the laws transferred to the jurisdiction of the Secretary of Transportation by subsection (e)(1), (2), and (6)(A) of section 6 of the Department of Transportation Act, as in effect on June 1, 1994, or a regulation prescribed or order issued by the Secretary under this chapter is shown to make that individual unfit for the performance of safety-sensitive functions, the Secretary, after notice and opportunity for a hearing, may issue an order prohibiting the individual from performing safety-sensitive functions in the railroad industry for a specified period of time or until specified conditions are met. This subsection does not affect the Secretary's authority under section 20104 of this title to act on an emergency basis.

(d) Regulations requiring reporting of remedial actions.--(1) The Secretary shall prescribe regulations to require that a railroad carrier notified by the Secretary that imposition of a civil penalty will be recommended for a failure to comply with this part, chapter 51 or 57 of this title, or a regulation prescribed or order issued under any of those provisions, shall report to the Secretary, not later than the 30th day after the end of the month in which the notification is received--

(A) actions taken to remedy the failure; or
(B) if appropriate remedial actions cannot be taken by that 30th day, an explanation of the reasons for the delay.

(2) The Secretary--

(A) not later than June 3, 1993, shall issue a notice of a regulatory proceeding for proposed regulations to carry out this subsection; and
(B) not later than September 3, 1994, shall prescribe final regulations to carry out this subsection.

§ 20112. Enforcement by the Attorney General

(a) Civil actions.--At the request of the Secretary of Transportation, the Attorney General may bring a civil action in a district court of the United States--

(1) to enjoin a violation of, or to enforce, a railroad safety regulation prescribed or order issued by the Secretary;
(2) to collect a civil penalty imposed or an amount agreed on in compromise under section 21301 of this title; or
(3) to enforce a subpena issued by the Secretary under this chapter.

(b) Venue.--(1) Except as provided in paragraph (2) of this subsection, a civil action under this section may be brought in the judicial district in which the violation occurred or the defendant has its principal executive office. If an action to collect a penalty is against an individual, the action also may be brought in the judicial district in which the individual resides.

(2) A civil action to enforce a subpena issued by the Secretary or a compliance order issued under section 20111(b) of this title may be brought in the judicial district in which the defendant resides, does business, or is found.

§ 20113. Enforcement by the States

(a) Injunctive relief.--If the Secretary of Transportation does not begin a civil action under section 20112 of this title to enjoin the violation of a railroad safety regulation prescribed or order issued by the Secretary not later than 15 days after the date the Secretary receives notice of the violation and a request from a State authority participating in investigative and surveillance activities under section 20105 of this title that the action be brought, the authority may bring a civil action in a district court of the United States to enjoin the violation. This subsection does not apply if the Secretary makes an affirmative written finding that the violation did not occur or that the action is not necessary because of other enforcement action taken by the Secretary related to the violation.

(b) Imposition and collection of civil penalties.--If the Secretary does not impose the applicable civil penalty for a violation of a railroad safety regulation prescribed or order issued by the Secretary not later than 60 days after the date of receiving notice from a State authority participating in investigative and surveillance activities under section 20105 of this title, the authority may bring a civil action in a district court of the United States to impose and collect the penalty. This paragraph does not apply if the Secretary makes an affirmative written finding that the violation did not occur.

(c) Venue.--A civil action under this section may be brought in the judicial district in which the violation occurred or the defendant has its principal executive office. However, a State authority may not bring an action under this section outside the State.